Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1554

GLEN H. FERRELL, PETITIONER,

versus

STATE OF SOUTH CAROLINA, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA

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STATE OF SOUTH CAROLINA, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA

Petitioner, by and through his attorneys, George W. Cone, attorney of record and John R. Hetrick, attorney for petitioner, prays that a writ of *certiorari* issue to review the judgment heretofore entered against him by the Supreme Court of South Carolina.

1. OPINIONS BELOW

Petitioner was convicted by a jury in the Circuit Court for the Thirteenth Judicial Circuit of South Carolina in Greenville, South Carolina, on February 6, 1978, of violating Section 44-53-370 which incorporates Section 44-53-230 of the *Code of Laws of South Carolina, 1976,* Appendix C at page 41, and specifically of possession with intent to distribute phencyclidine (PCP), a Schedule III controlled substance. On February 8, 1978, timely notice of appeal was filed with the Supreme Court of South Carolina. On May 23, 1978, the trial judge, the Honorable John

T. Gentry, ordered that the Public Defender for Greenville County be released as petitioner's trial counsel and that petitioner be permitted to retain private counsel, John R. Hetrick, then of Greenville, South Carolina, for perfecting the appeal. On January 7, 1980, the Supreme Court of South Carolina, by a 3-2 decision, affirmed petitioner's conviction. The written opinion of the Supreme Court of South Carolina is fully set forth in Appendix A at page 29 herein. On January 14, 1980, a motion for a stay of execution of sentence under Rule 28 of the Rules of the Supreme Court of South Carolina was filed with the Supreme Court of South Carolina. On January 23, 1980, an order granting a stay of execution of sentence for ninety days pending the filing of this petition for a writ of *certiorari* was issued by the Supreme Court of South Carolina.

2. JURISDICTION

The opinion and judgment of the Supreme Court of South Carolina, affirming petitioner's conviction, were entered on January 7, 1980. The jurisdiction of this Court is invoked pursuant to the provisions of Title 28, *United States Code,* Section 1257 (3).

3. QUESTIONS PRESENTED

I.

Under the Fourth Amendment as applied to the States through the Fourteenth Amendment is probable cause based on association and mere presence and absent particularity as to petitioner sufficient to support a warrantless search of petitioner's person or a warrantless arrest of petitioner and a search of his person incident thereto?

II.

Under the Fourth Amendment as applied to the States through the Fourteenth Amendment is a second *Terry* patdown search of petitioner constitutionally permissible after an initial *Terry* search failed to disclose any weapons?

4. CONSTITUTIONAL PROVISIONS

Constitution of the United States

Amendment IV—Searches and Seizures

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Amendment XIV, Section 1—Citizenship Rights Not to be Abridged by States

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction equal protection of the laws.

5. STATEMENT OF THE CASE

On October 13, 1977, Glen H. Ferrell was arrested in Greenville County, South Carolina and charged with possession and possession with intent to distribute phencyclidine (PCP), a controlled Schedule III narcotic, in violation of Section 44-53-370 which incorporates Section 44-53-230 of the *Code of Laws of South Carolina, 1976.* (Appendix C at page 41.) Ferrell was subsequently indicted and his trial commenced before a jury on February 6, 1978, at a term of the Court of General Sessions for Greenville County.

The federal question brought for review by this Court was first raised by written motion of trial counsel to suppress physical evidence, and was timely made at a pre-trial suppression hearing held *in camera* before the presiding judge of the Court of General Sessions in Greenville County. (TR. 8) The motion to suppress was based on the physical evidence being a fruit of an improper search of Ferrell's person. Hearing was held on the motion and testimony was taken from Sergeant Walt M. Parsons of the Greenville City Police. (TR. 12-34) Counsel's motion to suppress was denied. (TR. 31) Exception was taken to the trial court's denial of the motion to suppress.

The salient facts underlying petitioner's conviction reflect that Ferrell's arrest and search followed execution of a search warrant at No. 46, Westgate Manor Apartments in Greenville County by four officers of the Greenville Sheriff's and Police Departments. The warrant authorized the search of Apartment 46 which belonged to one, Phil Mason. (TR. 13, 37) Information in the warrant was pursuant to a confidential informant's "tip" to Sergeant Parsons. The informant alleged that the apartment's occupant, Mason, dealt in marijuana and hashish and that the informant had seen marijuana and hashish on the premises within

the past 24 to 48 hours. (TR. 13-14) The informant also stated that Mason owned a gray Corvette which he would likely be driving to transport drugs from a secret location at Donaldson Center, an abandoned Air Force Base, which is south of the City of Greenville and approximately 10 to 12 miles from the apartment complex. (TR. 16-17, 38-39) The warrant alleged that the informant had given reliable information in the past. (TR. 14-15, 42) No information was provided as to Ferrell, nor did the police have any information as to Ferrell from other independent sources at the time the search warrant was obtained. (TR. 37-38)

On the afternoon of October 13, 1977, at approximately 3:30 P.M., Officer Parsons went to the apartment complex to observe the scene before obtaining his search warrant. (TR. 39) There was no gray Corvette parked at the apartments at this time. (TR. 15, 39) Following this and based on the informant's information, he obtained a search warrant for Mason's apartment at approximately 5:00 P.M. No search warrant was obtained for Mason or his automobile. (TR. 26-27) About 9:30 P.M., four officers, including Officer Parsons, went to execute the search warrant for Mason's apartment. At this time they saw a gray Corvette parked at the apartment complex but the officers were unable to get a tag number, apparently because of several persons in the vicinity of the parking lot and the fear they would be recognized as the police. The officers were in an unmarked car. (TR. 39, 52-53)

The four officers then drove to a parking lot located approximately two or three blocks from the apartment complex to plan the execution of the warrant. (TR. 17, 40-41) While there, the officers saw a gray Corvette drive past on Whitehorse Road, a major four-lane highway in the City of Greenville, running generally in a north-south direction. (TR. 17, 40) The officers did not recognize the driver of the automobile but observed that there were two

people in the car. (TR. 25-26, 40) The officers did not see Mason's gray Corvette leave the parking lot of Westgate Manor Apartments. (TR. 43) Although the gray Corvette which the officers observed was driving south along Whitehorse Road in the general direction of Donaldson Center, it was not followed by the police. (TR. 61)

The officers returned to the apartment complex to execute their warrant. The gray Corvette they had seen earlier in the parking lot was not there at this time. (TR. 18) Approximately 20 or 30 minutes after seeing a gray Corvette drive past on Whitehorse Road and momentarily after the officers' return to the apartment complex, a gray Corvette entered the parking lot and Officer Parsons recognized the driver as Mason. (TR. 18, 41-42) The passenger, Ferrell, was unknown to the police. (TR. 24-25, 55, 65)

The four officers, with guns drawn, approached the automobile as the driver, Mason, and passenger, Ferrell, were getting out. (TR. 30, 44, 52) Both Mason and Ferrell were frisked for weapons, but no weapons or contraband were found. (TR. 63, 68) Mason's car was then searched pursuant to owner's consent and nothing was found. (TR. 20, 44) The four officers then informed both Mason and Ferrell that they should accompany them to Mason's apartment where a search of their persons would be conducted. (TR. 19-20, 30, 45) Apparently the night was cold and misting rain. (TR. 20, 45) Neither Mason nor Ferrell argued with the officers or resisted going to the apartment. (TR. 19) Neither person was formally placed under arrest or advised of his rights at this time. (TR. 24, 30, 56, 67) The police searched Mason's apartment pursuant to their warrant and found no contraband. (TR. 22) A search of Mason's person in his apartment revealed no contraband. (TR. 46) No charges were brought against Mason. (TR. 22) Inside the apartment a second search of Ferrell was then conducted by Officer Parsons. (TR. 64) Ferrell was again

patted-down, and Officer Parsons heard a suspicious sound. (TR. 21, 46) Parsons then told Ferrell to remove the "object" from his pants or Ferrell could go with him to a bedroom and take off his pants. (TR. 47) Ferrell removed from his clothing a bag containing 99 purple tablets. (TR. 47) At this time Ferrell was formally placed under arrest and advised of his rights. (TR. 48, 67) The 99 purple tablets were subsequently determined to contain phencyclidine.

Ferrell was convicted by a jury verdict of possession with intent to distribute phencyclidine. On May 23, 1978, it was ordered that the Public Defender for Greenville County be released from the case and that Ferrell be allowed to retain a private attorney, John R. Hetrick, for perfecting the appeal. On direct appeal to the Supreme Court of South Carolina the judgment of the trial court was affirmed by a 3-2 decision.

6. REASONS FOR GRANTING THE WRIT

There is apparent confusion on the part of law enforcement officials and the courts in South Carolina regarding "association" and "mere presence" as a constitutional basis for probable cause which, we respectfully submit, needs this Court's consideration. Contrary to this Court's definitive position in cases such as *United States v. DiRe,* 32 U. S. 581 (1933), *Sibron v. New York,* 392 U. S. 41 (1968) and most recently *Ybarra v. Illinois,* .... U. S. ...., 48 U.S.L.W. 4023 (November 28, 1979), in South Carolina association and mere presence alone are deemed constitutionally sufficient to support probable cause to search or arrest, and searches of all occupants on suspected premises are conducted as "standard procedure." (Excerpts from the Trial Testimony, Appendix B (1) at page 38). In the case at bar a majority of the South Carolina Supreme Court has perpetuated this misunderstanding by attempting to factually distinguish the *DiRe* and *Sibron* cases, by

not considering this Court's recent *Ybarra* decision, which was considered by Justices Gregory and Rhodes in their dissenting opinion, and by misapplying the particularity requirement of the Fourth Amendment. Clarification and mandate are needed to prevent further abridgment of constitutionally protected privileges and immunities of South Carolina citizens.

I.

Under the Fourth Amendment as applied to the States through the Fourteenth Amendment is probable cause based on association and mere presence and absent particularity as to petitioner sufficient to support a warrantless search of petitioner's person or a warrantless arrest of petitioner and a search of his person incident thereto?

Possession of narcotics is an offense in South Carolina. Therefore, in the case at bar there is no critical distinction between probable cause to search, *Carroll v. United States,* 267 U. S. 132 (1924), and probable cause to arrest. *Beck v. Ohio,* 379 U. S. 89 (1965). Had the officers reasonably believed that Ferrell had narcotics on his person, they necessarily would have believed that he was committing an offense and could have legally arrested him and searched him incident thereto under the dictates of *Chimel v. California,* 395 U. S. 752 (1969). See also, *United States v. Robinson,* 414 U. S. 278 (1974). For this reason, treatment of the question of existence of probable cause to search or arrest and conduct a search incident thereto are joined rather than examined separately.

At trial pursuant to a motion to suppress and on direct appeal to the South Carolina Supreme Court, petitioner challenged the introduction of physical evidence obtained incident to a warrantless search of his person without probable cause. The trial court denied relief and the South Carolina Supreme Court affirmed the lower court judgment in a 3-2 decision, reasoning that the search of Ferrell's person was justified as incident to his lawful arrest.

On appeal petitioner argued that probable cause for arrest or search existed only as to Mason, if at all, and that the arrest and incident search of Ferrell was improper as abrogating the particularity requirement of the Fourth Amendment. The police had no information linking Ferrell to Mason's activities prior to the second search of Ferrell. When the police approached Mason's car in the apartment parking lot, all their information related to Mason not Ferrell. (Excerpts from the Trial Testimony, Appendix B (2) at page 38.) The search of Mason's car pursuant to owner's consent disclosed no evidence or contraband to justify a subsequent arrest or search of Ferrell. (Excerpts from the Trial Testimony, Appendix B (3) at page 39.) The initial pat-down search of Ferrell disclosed no weapons or contraband to justify a further intrusion of Ferrell's person. (Excerpts from the Trial Testimony, Appendix B (4) at page 39.)

In the case at bar the trial testimony reflects that there was no information whatsoever as to petitioner at the moment he entered the parking lot in Mason's automobile. Nor did subsequent search of Mason's car or the pat-down search of Ferrell or Mason uncover any evidence which might have ripened into probable cause to either search or arrest Ferrell. Any probable cause as to Ferrell, if it existed, must necessarily have been supported by the informant's information as to Mason or Mason's drug activities and so the South Carolina Supreme Court reasoned, emphasizing the "totality of factual circumstances" and their "cumulative effect" in concluding that probable cause to arrest Ferrell and search him incident thereto existed. A majority of the South Carolina Court in *State v. Ferrell,* .... S. C. ...., Opinion No. 21107 (January 7, 1980), relied on the following factual determinations: "(1) that

illicit drugs had recently been seen and sold in Mason's apartment; (2) that Mason owned a gray Chevrolet Corvette automobile; (3) that Mason 'would probably' be going out to Donaldson Center to pick-up more drugs; (4) that a gray Chevrolet Corvette automobile with two occupants had recently been driven from the direction of Mason's apartment toward Donaldson Center; and (5) that a gray Chevrolet Corvette automobile occupied by Mason and appellant (Ferrell) had just pulled into the parking lot." *State v. Ferrell,* Appendix A at page 29. We agree with the *Ferrell* Court's determinations of fact; we disagree with its conclusions of law based on these facts.

That an informant had recently seen illicit drugs in Mason's apartment is wholly unrelated to Ferrell or his apparent association with Mason. A warrant had issued for the search of Mason's apartment based on an informant's "tip" that he had seen drugs being sold there within the past 48 hours. No information in the warrant named Ferrell or alleged that he or unknown persons were dealing in drugs from that apartment. No information reflected that Ferrell had ever been to Mason's apartment or even knew Mason. Only after the police had arrested Ferrell and compelled him to go to Mason's apartment to be searched was Ferrell on the premises for which the warrant had issued and then involuntarily.

The particularity requirement of the Fourth Amendment mandates that a warrant particularly describe the "place to be searched and the persons or things to be seized." We assume that since warrants for the search, not seizure, of persons are permissible when the person to be searched is named in the warrant,[1] then for purposes of a

[1] In *Ybarra v. Illinois,* .... U. S. ...., 48 U.S.L.W. 4023 (November 28, 1979), the warrant specifically authorized the search of the "person of 'Greg' the bartender, a male, white with blondish hair, appx. 25 yrs."

search, a "person" and a "place" are substantial equivalents. Should the "search of a person" be treated as a "seizure of that person" the particularity requirement of the Amendment still controls. In either instance the warrant in the instant case prescribed the search of a particular place, Mason's apartment, not Ferrell's person.

In the recent case, *Ybarra v. Illinois,* .... U. S. ...., 48 U.S.L.W. 4023 (November 28, 1979), this Court held that the right of the police to search "compact" premises pursuant to warrant did not confer an automatic right to conduct even a limited pat-down search of persons found on the premises. It is well established that a limited weapons search as recognized in *Terry v. Ohio,* 392 U. S. 1 (1968), is a lesser intrusion of privacy than a full search of the person as conducted in the instant case. How then, absent probable cause, can a body search of a person not on premises subject to a warrant be constitutionally justified when a limited pat-down search of persons physically on such premises is denied?

We would suppose the South Carolina Court in the case at bar would contend under its "totality of the circumstances" approach that this fact upon which the warrant issued corroborated or supported other facts as to Ferrell and that the "cumulative effect" of all facts taken together supported probable cause to arrest and search Ferrell. While we agree that this fact might be considered in support of probable cause as to Mason, we deny its relevance as to petitioner. Mason leased the apartment. He had been designated by the informer as dealing in drugs out of his apartment and of using his automobile to transport drugs from Donaldson Center to his apartment where they were sold. It logically follows that the apartment played an integral role in Mason's operations but had no nexus as to Ferrell. Ferrell's riding as a passenger in Mason's car and the search warrant for Mason's apartment are independent

circumstances linked only by Mason's common involvement with each. This consideration is irrelevant and unrelated to any of Ferrell's activities.

Facts (2), (3) and (4), *supra,* at 10, largely relate to the informant's information as to Mason's activities. The informer told the police that Mason would "likely" be driving his car, a gray Corvette, to Donaldson Center to pick-up drugs and then return to the apartment complex. Again there was no information as to Ferrell but only as to Mason.

Prior to the execution of their warrant, the police went to the apartment complex for a look at the scene. They saw a gray Corvette parked in the parking lot but were unable to get the license number because of several persons "milling around" in the vicinity and the fear they would be recognized as the police. They left and went to a parking lot several blocks away to plan the execution of the warrant. While there, they saw a gray Corvette traveling south on Whitehorse Road, a major four-lane highway in the City of Greenville, and in the general direction of Donaldson Center. They saw two occupants in the car but could recognize neither. On their return to the apartment complex, they observed that the gray Corvette they had seen earlier in the parking lot was gone. Momentarily after their return, Mason's automobile entered the parking lot and the police recognized Mason.

All of the informant's information related to Mason, his car or his activities. Prior to Mason's car entering the parking lot, the police did not know Ferrell existed. Only if it is assumed that Ferrell was one of the two occupants in the Corvette seen traveling on Whitehorse Road, only if it is assumed that the gray Corvette was Mason's, only if it is assumed that the Corvette did go to Donaldson Center and only if it is assumed that drugs were picked-up, if and when the Corvette went to Donaldson Center, can any

involvement by Ferrell in Mason's activities be inferred. On the facts, this is pure speculation. Inference piled upon inference does not support probable cause as envisioned by the Fourth Amendment.[2] *Brady v. United States,* 24 F. 2d 399 (C.A. 8, 1928); *United States v. Grow,* 394 F. 2d 182 (C.A. 4, 1968).

We consider, however, whether the informant's information supported probable cause even as to Mason, for if it failed to, then undoubtedly probable cause was absent as to Ferrell. In *Aguilar v. Texas,* 378 U. S. 108 (1964), Mr. Justice Goldberg, writing for a majority of this Court, set forth a "two-pronged" test for determining the sufficiency of an informer's information necessary to support a search warrant. First, "the magistrate must be informed of some of the underlying circumstances from which the informant concluded that the narcotics were where he claimed they were" and second, "some of the underlying circumstances from which the officer concluded that the informant, whose identity need not be disclosed, was 'credible' or his information 'reliable'." *Aguilar,* at 114. We do not question the informant's "credibility" in the instant case. We do question the lack of information as to the underlying circumstances from which the informant concluded that Mason would drive to Donaldson Center to pick-up drugs on that particular night. How did the informant know this? Had Mason told the informant that the transaction was to take place that night? Had the informant been to Mason's "stash house" at Donaldson Center before? Had he seen Mason pick-up or drop-off drugs at the "stash house"? Had Mason even told the informant that he had a "stash house" at

[2] We acknowledge that the quantum of evidence necessary to support probable cause is lesser than that needed to convict at trial and in this respect *Brady v. United States,* 24 F. 2d 399 (C.A. 8, 1928), is distinguishable. *Draper v. United States,* 358 U. S. 307 (1959). Nevertheless, the logic underlying the legal reasoning in both *Brady* and *Grow,* we submit, is applicable to a determination of probable cause and the quantum of information necessary to support it.

Donaldson Center? This is critical information which must support probable cause for a warrant to issue in accordance with the *Aguilar* standards. See also, *Spinelli v. United States,* 393 U. S. 410 (1969). Without it the warrant is defective. It follows that if the information is insufficient to support probable cause for a search with warrant, it is insufficient to support probable cause for a search without warrant.

Nor did the police independently corroborate the informant's information, following the reasoning in *Draper v. United States,* 358 U. S. 307 (1955). The police could have followed the gray Corvette which passed them on Whitehorse Road to positively determine if it went to Donaldson Center or at the very least to obtain a "tag" number to identify it as Mason's car. They did neither. This lack of independent corroboration is considered by Justice Gregory in his dissenting opinion in *Ferrell,* Appendix A at page 29. Viewing the factual circumstances in the light most favorable to the government, at best the only "corroboration" by the police was (a) that they initially saw a gray Corvette at Mason's apartment complex and on their return 20 or 30 minutes later the gray Corvette was gone, (b) that they saw a gray Corvette traveling south on Whitehorse Road in the general direction of Donaldson Center, (c) that there were two persons in a gray Corvette that passed the police on Whitehorse Road and there were two persons in Mason's gray Corvette as it entered the apartment complex parking lot and (d) that the expired time from the moment the police saw the gray Corvette pass them on Whitehorse Road until Mason's automobile entered the parking lot was approximately 20 or 30 minutes and this, considering the round-trip distance involved, was sufficient time for an automobile to travel from the apartment complex to Donaldson Center and return.

These facts and the inferences reasonably drawn from them, considered in conjunction with the informant's information, fall short of the detailed corroboration underlying Draper. In *Draper* the degree of detail in which the informant described Draper, to include a precise description of his complexion, age, height, weight, clothing and gait, coupled with the informant's precise information as to the time of Draper's return and the train he would be on, sufficiently corroborated the informant's information as to the narcotics to support probable cause for Draper's arrest. This Court emphasized that ". . . with every other bit of information verified, Marsh had "reasonable grounds" to believe that the remaining unverified bit of Hereford's information—that Draper would have the heroin with him—was likewise true." *Draper,* at 313.

We agree that had the police in the instant case verified their information by first determining that the gray Corvette that passed them was in fact Mason's and then by following the car to Donaldson Center, they might have had sufficient probable cause to arrest Mason and search him incident to arrest even though the information that he would pick-up drugs was unverified. This justification, however, would not extend to the passenger, Ferrell, since the police had no information as to him. But even as to Mason, the facts in the case at bar when considered with the informant's information simply do not support such an intrusion. Specifically, the informant's information is too general; the police corroboration too incomplete. Had Mason driven a pink Ferrari or even a Ferrari, a visual sighting by the police may have been sufficient corroboration that the car that passed them on Whitehorse Road was in fact Mason's. This, of course, still fails to establish that the automobile went to Donaldson Center or that Ferrell was a passenger in the car that passed the police on Whitehorse Road. But Mason drove a gray Corvette. On direct appeal

petitioner argued that in a city the size of Greenville, it can hardly be suggested that there is only one gray Corvette and that it belongs to Phil Mason. Gray is a common color and Corvettes, though expensive automobiles, are by no means rare.

Corroboration of a gray Corvette seen headed south in the general direction of Donaldson Center is likewise inconclusive. Whitehorse Road is a major thoroughfare running north and south in the City of Greenville. Any automobile traveling on Whitehorse Road would have a fifty percent chance of traveling in the direction of Donaldson Center.

Nor is the time element conclusive. Even assuming that the automobile the police saw was Mason's, there are any number of places besides Donaldson Center he could have driven to and returned from in a 20 to 30 minute period.

Probable cause must be more than a "mere suspicion." *Brinegar v. United States,* 338 U. S. 160 (1949). Mere affirmation of belief or suspicion is not enough and this is particularly true when hearsay information supports probable cause, *Nathanson v. United States,* 290 U. S. 41 (1933); *Aguilar v. Texas,* 378 U. S. 108 (1964); *United States v. Ventresca,* 380 U. S. 102 (1965); *Draper v. United States,* 358 U. S. 307 (1959); and an affidavit supporting probable cause which is based on hearsay will only be sufficient "so long as a substantial basis for crediting the hearsay is presented." *Jones v. United States,* 362 U. S. 257, 269 (1960). Though independent corroboration may be sufficient to ripen hearsay information into probable cause in the absence of personal knowledge of an informant, such corroboration must be sufficiently detailed to enable a detached magistrate to infer that the informant had gained his information in a reliable way. *Draper,* at 313. See also, *Aguilar v. Texas,* 378 U. S. 108 (1964).

In the case at bar we agree that considered together the "cumulative effect" of the police observations, coupled with the informant's information, might have been sufficient to raise a "suspicion" that Mason's illegal activities were underfoot. But the corroboration is too slight, the detail too sparse, to ripen hearsay into probable cause even as to Mason. In sum, since there was no probable cause to search or arrest Mason, it logically follows there was none as to Ferrell.

When Mason's automobile entered the apartment complex parking lot, the police obtained their first "information" as to Ferrell. Prior to this it is undisputed that they had no information, hearsay or otherwise, as to him. For all the police knew, at that moment, Ferrell was merely a passenger in Mason's car. They had no information as to any actual association as distinguished from apparent association, between Mason and Ferrell. There was no evidence that Mason and Ferrell knew each other or that their "association" was more than momentary. "Ferrell could have been a hitchhiker." Testimony of Sergeant Walt Parsons, Appendix B(2) at page 38. However, based on this "apparent association" with nothing more, the police grounded their probable cause to arrest and search Ferrell.

We rely initially on *Sibron v. New York,* 392 U. S. 41 (1968), to support the position that "guilt by association" or more precisely "probable cause by association" is constitutionally impermissible. Factually, *Sibron* would appear to be a stronger case for supporting probable cause since in that case the policeman determined the association between *Sibron* and the addicts to have continued over a period of eight hours. In the instant case the apparent association of the parties was momentary. No conversation between the parties was overheard by the police in either

case. Mr. Chief Justice Warren, writing for the majority in *Sibron,* noted in reversing appellant's conviction:

> The inference that persons who talk to narcotic addicts are engaged in criminal traffic in narcotics is simply not the reasonable sort of inference required to support an intrusion by police upon an individual's personal security. *Sibron,* at 62.

We suggest that there is no significant legal distinction between talking to known narcotic addicts in a bar and riding in an automobile with a person suspected of dealing in drugs. Further, Mr. Justice Harlan, concurring in *Sibron,* wrote:

> Although association with known criminals may, I think, properly be a factor contributing to the suspiciousness of circumstances, it does not, entirely by itself, create suspicion adequate to support a stop. There must be something at least in the activities of the person being observed or in his surroundings that affirmatively suggests particular criminal activity, completed, current or intended. *Sibron,* at 73.

Petitioner's activities in the instant case do not suggest particular criminal activity completed, current or intended. Ferrell was merely a passenger riding in an automobile.

In the recent case *Ybarra v. Illinois,* .... U. S. ...., 48 U.S.L.W. 4023 (November 28, 1979), a majority of this Court, citing *Sibron,* said:

> A person's mere propinquity to others independently suspected of criminal activity does not, without more, give rise to probable cause to search that person. *Ybarra,* at 4025; *Sibron,* at 62, 63.

Further,

> Where the standard is probable cause, a search or seizure of a person must be supported by probable cause particularized with respect to that person. This requirement cannot be undercut or avoided by simply pointing to the fact that coincidentally there exists probable cause to search or seize another or to search the premises where the person may happen to be. The Fourth and Fourteenth Amendments protect the 'legitimate expectations of privacy' of persons, not places. *Ybarra,* at 4025; *Rakas v. Illinois,* 439 U. S. 128, 138-143, 148-149 (1979); *Katz v. United States,* 389 U. S. 347, 351, 352, (1967).

The particularity requirement of the Fourth Amendment was eroded in supporting probable cause to search or arrest Ferrell. Ferrell's "mere propinquity" to Mason and Mason's activities was the government's basis for his arrest and search in the instant case.

In *United States v. DiRe,* 32 U. S. 581 (1933), relied heavily on by petitioner in support of his case on appeal, the government conceded that "armed with a search warrant for a house they could not search the occupants in the house," *DiRe,* at 587, and this Court reasoned:

> By parity of reasoning with that on which the government disclaims the right to search occupants of the house, we suppose that the government would not contend that if it had a valid search warrant for the car only, it could search the occupants as incident to its execution. How then could we say that the right to search a car without a warrant confers greater latitude to search occupants than search by warrant would permit? *DiRe,* at 587.

Further,

> We are not convinced that a person by mere presence in a suspected car, loses immunities from the search of his person to which he would otherwise be entitled. *DiRe,* at 587.

In the case at bar the South Carolina Supreme Court dismissed the factual applicability of *DiRe,* reasoning that "it is important to distinguish the search in this case (Fer-

rell) from the search of companions in a public place."[3] *State v. Ferrell,* Appendix A at page 29. We would suppose that the South Carolina Court would contend that while the search of occupants of a "public place", the "compact premises" in *Ybarra,* would be constitutionally impermissible, the search of a small number of persons in a "private place", particularly where some degree of association, either actual or apparent, can be shown, would be justified, providing that the "place and circumstances" satisfy the test of reasonableness per the *Katz* decision. *Katz v. United States,* 389 U. S. 347 (1967). This fails to grasp the legal significance of the *DiRe* and *Katz* decisions. *DiRe* held that mere presence in a suspected automobile does not abrogate a person's Fourth Amendment immunities. The importance of the *DiRe* decision is affirmed in *Katz* and its progeny, "the Fourth Amendment protects persons, not places," *Katz,* at 353, and so this Court has held on numerous occasions.

Factually, the search of DiRe would appear easier to justify than the search of Ferrell since contraband was seen passing between two occupants of the car in which DiRe was a passenger while in *Ferrell* the consent search of Mason's car disclosed none. Certainly it could reasonably be inferred that DiRe was aware of the illegal transaction though he may not have been an accessory or party to a conspiracy. By comparison such an inference as to Ferrell is unsupported.

The state's interest in enforcing its drug laws does not override the personal liberties safeguarded by the Fourth Amendment. Necessity does not justify arrests or searches otherwise impermissible because of lack of probable cause. Though necessity is suggested as a justification for the search of Ferrell, since drugs are easily concealable and the

[3] Factually, both *DiRe* and the instant case deal with the search of occupants of an automobile not patrons of public places.

expedient of hiding contraband on a person is a reality, this Court in *DiRe* expressly rejected this argument. *DiRe,* at 587.

When Ferrell and Mason were patted-down in the apartment parking lot, the police had no probable cause as to either. The pat-down search of Ferrell disclosed no weapons or contraband. The consent search of Mason's automobile uncovered nothing. Since no contraband was found, these factual aspects of the case are noted but not discussed since they do not affect the ultimate determination of probable cause.

We agree with the South Carolina Supreme Court that Ferrell and Mason were placed under arrest when they were compelled to accompany the police to Mason's apartment where a search of their persons was to be conducted since at this point they were substantially deprived of their freedom irrespective of whether the formalities of *Miranda v. Arizona,* 384 U. S. 439 (1966) were followed. See also, *Henry v. United States,* 361 U. S. 98 (1959). Factual discrepancy exists in the trial record as to whether Ferrell was arrested prior to the second search in Mason's apartment or after the contraband was discovered and Ferrell was formally placed under arrest and advised of his rights. (TR. 28, 54.) The distinction is not critical since probable cause for the second search in Mason's apartment or Ferrell's arrest in the parking lot prior to the second search was nonexistent. The analysis is affected, however, by factually viewing the second search as an illegal search or as incident to an invalid arrest. In either instance we submit that Ferrell should not have been compelled to submit to the second search but should have been permitted to leave the premises after the fruitless pat-down search in the parking lot, if not before.

Though contraband was found on Ferrell's person as a fruit of the search in Mason's apartment, it is well estab-

lished that probable cause is not retroactive in its determination, application or effect. *In Re Jones,* 264 S. C. 286, 214 S. E. 2d 816 (1975). "The pertinent circumstances (upon which probable cause is based) are those of the moment, the actual ones. A search is not made legal by what it turns up. In law, it is good or bad when it starts and does not change character from its success." DiRe, at 595. In the case at bar the contraband found on Ferrell's person was the fruit of an illegal search or a search incident to an unlawful arrest. The result did not justify the search or arrest by retroactively establishing probable cause.

Finally, it is well established that searches or arrests pursuant to warrant are favored in law over those without. *Beck v. Ohio,* 379 U. S. 89 (1965); *United States v. Ventresca,* 380 U. S. 102 (1965); *Coolidge v. New Hampshire,* 403 U. S. 443 (1971). Assuming that the police had probable cause for the arrest or search of Ferrell, which we expressly deny, they should have obtained a warrant before proceeding with their arrest or search of petitioner. No offense had been committed in their presence. Ferrell could easily have been detained long enough for a neutral, detached magistrate to make the probable cause determination. He posed no threat to the police, who had previously patted him down and found no weapons. At best the government's quantum of evidence was minimal and undeniably circumstantial. Probable cause, if it existed was marginal. In cases where probable cause is a "close" determination, searches or arrests pursuant to warrant may be upheld on a lesser quantum of evidence, whereas a search or arrest without warrant may not be. *United States v. Ventresca,* 380 U. S. 102, 106 (1965). In the case at bar the determination of probable cause at best was "close". Since the search or arrest of Ferrell took place without a warrant, any evidence as to Ferrell, if it existed, should be deemed insufficient to support probable cause.

II.

Under the Fourth Amendment as applied to the States through the Fourteenth Amendment is a second *Terry* pat-down search of petitioner constitutionally permissible after an initial *Terry* search failed to disclose any weapons?

There is some factual question as to whether the second search of Ferrell in Mason's apartment was a limited pat-down search of his clothing or a full search of his person. As discussed in Question I, the second search of petitioner's person cannot be justified since the police lacked probable cause to search him or to arrest him and search him incident thereto. Can then a second limited *Terry* search be justified?

It is well established that the purpose of the limited pat-down search of a suspect's outer clothing as authorized in *Terry v. Ohio,* 392 U. S. 1 (1968), is to discover weapons which might be used against the "detaining" officer. Thus, the scope of *Terry* is narrow and the weapons frisk must be reasonable and is only justified where there is a "reasonable belief" short of probable cause that the suspect is armed. *Terry,* at 27; *Ybarra,* at 4025. Protection of the officer is the paramount consideration, and though contraband discovered pursuant to a lawful *Terry* search is admissible, *Terry* is not a substitute for the search of a person pursuant to warrant. In the case at bar the initial pat-down of Ferrell failed to disclose any weapons. It is difficult to understand how the government justifies its second pat-down search of Ferrell in Mason's apartment. Referring to the second pat-down search of Ferrell, Sergeant Walt M. Parsons testified on direct examination:

> Q. Sergeant, you say a "search," you mean a pat-down?
> A. A pat-down, yes, sir.
> (TR. 46.)

Assuming that the initial pat-down of Ferrell in the parking lot was to discover weapons and to protect the officers, it can hardly be suggested that the officers' safety was enhanced by compelling petitioner to go to Mason's apartment, since it is reasoned that the greater the number of persons on the premises during the execution of the search warrant, the greater the potential threat to the officers would be.

On appeal petitioner argued that multiple pat-down searches are patently unreasonable and constitute an "end-run" around the protections of the Fourth Amendment as implemented by this Court's narrow holding in *Terry*. To permit a series of "limited" intrusions is tantamount to the more severe intrusion of a personal search, if not a more harrassing and abusive procedure. We submit that when multiple *Terry searches* are conducted, such searches cease to be a mere "minor inconvenience or petty indignity" to the person searched. *Terry,* at 10. In the case at bar the second pat-down search of petitioner was unreasonable and constitutionally unjustified.

CONCLUSION

In conclusion, the trial testimony reflects that the police had no information as to Ferrell or his association with Mason or Mason's activities. "Guilt by association" or specifically, "probable cause by association" is constitutionally impermissible. Further, the police had no probable cause as to Mason, since the informant's information as to Mason's activities lacked detail, was not based on the informant's personal knowledge or observations, except as to Mason's apartment for which the warrant had issued, and was not sufficiently corroborated by the police. Factually, in the instant case if probable cause was absent as to Mason, then it was necessarily absent as to Ferrell. At the time of Ferrell's initial frisk in the apartment parking lot

there was no probable cause as to Ferrell, and even the propriety of the limited pat-down search of petitioner is questioned by this Court's decision in *Ybarra* and the lack of particularity required for even a "reasonable belief" under *Terry*. Even assuming that the initial pat-down of Ferrell can be justified, nothing was discovered on his person and the subsequent consent search of Mason's automobile likewise uncovered no contraband. At the point Ferrell and Mason were compelled to go to Mason's apartment and submit to a personal search, the sparse information which the police had as to Mason had not ripened into probable cause as to Ferrell.

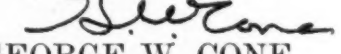
Petitioner was arrested under the rationale of *Miranda* since he was substantially deprived of his freedom at the moment he was compelled to go to Mason's apartment and submit to a personal search irrespective of whether he was formally advised of his rights. His arrest was illegal since it lacked probable cause and the contraband discovered pursuant to the second search is inadmissible as the fruit of an unlawful arrest and should have been suppressed. Probable cause is not retroactive in its determination, application or effect and so the subsequent discovery of contraband did not establish probable cause to justify the prior arrest and search incident thereto. Should it be determined that Ferrell was not arrested in the parking lot, then the search of his person in Mason's apartment was still not justified since probable cause to search was lacking. Again the contraband discovered should have been suppressed as the fruit of an illegal search. In either instance a warrant should have been obtained to either search or arrest Ferrell.

Assuming the second search of Ferrell was a limited pat-down search, as the police testified, the same is unjustified. Multiple *Terry* searches are constitutionally impermissible as amounting to more than a mere "minor inconvenience and petty indignity." The police hardly fostered

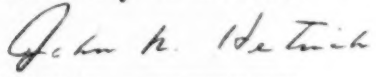
their safety by compelling Ferrell to accompany them to Mason's apartment to execute their search warrant. Petitioner should have been permitted to leave the premises after his initial frisk in the parking lot, if not before.

Based on the foregoing, petitioner's rights, privileges and immunities as claimed under the Constitution of the United States and the Constitution of South Carolina have been violated. Petitioner files his writ of *certiorari* pursuant to the provisions of Title 28, *United States Code,* Section 1257 (3). Petitioner prays this Court that its writ of *certiorari* issue to review the judgment of the Supreme Court of South Carolina entered against him and that said judgment be reversed.

Respectfully submitted,



GEORGE W. CONE,
Attorney of Record.



JOHN R. HETRICK,
Attorney for Petitioner.
(Not admitted to practice before this Court.)

Appendices

APPENDIX A

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

THE STATE, Respondent,

versus

GLEN H. FERRELL, Appellant

Appeal from Greenville County
John T. Gentry, Special Circuit Judge

Opinion No. 21107
Filed January 7, 1980

AFFIRMED

John R. Hetrick, of Greenville, for appellant.
Attorney General Daniel R. McLeod and Assistant Attorneys General Brian P. Gibbes and Kay G. Crowe, all of Columbia; and Solicitor William W. Wilkins, Jr., of Greenville, for respondent.

NESS, A. J.: Appellant Ferrell was convicted of possession with intent to distribute phyncyclidine (PCP), a Schedule III controlled substance, and was sentenced to three years imprisonment. We affirm.

In the early afternoon of October 13, 1977, Sergeant Walter M. Thompson of the Greenville Police Department received information from a confidential informant that illicit drugs were being distributed from an apartment occupied by Phil Mason. On the basis of this information, a warrant was obtained to search the apartment.

It is conceded the search warrant for Mason's apartment was valid, based upon a reliable informant's tip that he had personally witnessed the distribution of illicit drugs from the premises within the past twenty-four to forty-eight hours. *Spinelli v. U. S.*, 393 U. S. 410, 89 S. Ct. 584, 21 L. Ed. 2d 637 (1969); *Aguilar v. Texas*, 378 U. S. 108, 84 S. Ct. 1509, 12 L. Ed. 2d 723 (1964); *State v. Winborne*, ... S. C. ...., 254 S. E. 2d 297 (1979); *State v. Peters*, 271 S. C. 498, 248 S. E. 2d 475 (1978).

Additionally the informer advised the police that Mason owned a gray Chevrolet Corvette automobile and that he "would probably" be going out to Donaldson Center to pick up more drugs on the evening of the warrant's execution.

The officers observed a gray Chevrolet Corvette automobile with two occupants travelling from the vicinity of Mason's apartment in the direction of Donaldson Center. Shortly thereafter, they observed a gray Chevrolet Corvette automobile with Mason and appellant therein drive into the apartment complex parking lot. The officers approached the two men, conducted a brief pat down search of their persons in the cold and rain. The officers then directed the two men to go into Mason's apartment, where a more thorough search of appellant revealed ninety-nine PCP tablets.

Appellant asserts this second search of his person was improper and the PCP tablets should not have been admitted at his trial. We disagree.

We have no difficulty holding that the initial pat down search conducted in the parking lot fell well within the "stop and frisk" exception to the Fourth Amendment warrant requirement. See *Commonwealth of Pennsylvania v. Mims*, ... U. S. ...., 98 S. Ct. 330, 334 (1977); *Terry v. Ohio*, 392 U. S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968); *State v. Foster*, 269 S. C. 373, 237 S. E. 2d 589 (1977). At the time the officers conducted this search, they were aware of the following facts: (1) that illicit drugs had recently been seen and sold in Mason's apartment; (2) that Mason owned a gray Chevrolet Corvette automobile; (3) that Mason "would probably" be going out to Donaldson Center to pick up more drugs; (4) that a gray Chevrolet Corvette automobile with two occupants had recently been driven from the direction of Mason's apartment toward Donaldson Center; and (5) that a gray Chevrolet Corvette automobile occupied by Mason and appellant had just pulled up in the parking lot. These specific and articulable facts, taken together with the rational inferences from those facts, clearly warranted the conclusion that criminal activity might have been afoot.

We have no more difficulty holding that the more thorough search in Mason's apartment fell within the search incident to a valid custodial arrest exception to the warrant requirement. Police officers may make a search of an arrestee's person and the area within his immediate control for weapons and destructible evidence without first obtaining a search warrant. See *U. S. v. Robinson*, 414 U. S. 218, 94 S. Ct. 467, 38 L. Ed. 2d 427 (1973); *In Re Jones*, 264 S. C. 286, 214 S. E. 2d 816 (1975). The sole prerequisite is that there be a prior arrest supported by probable cause.

When the police officers ordered Mason and appellant out of the parking lot and into Mason's apartment, they so substantially deprived the two men of their freedom of movement as to constitute a full custodial arrest. *Henry v. U. S.*, 361 U. S. 98, 80 S. Ct. 168, 4 L. Ed. 2d 134 (1959).[1] Clearly the officers' actions constituted a sufficient show of authority to restrain appellant's freedom of movement, therefore, the appellant was seized. *U. S. v. Palmer*, 25 Cr. L. 2456 (8th Cir. 7/26/79). The search in Mason's apartment being incident to this arrest, the whole issue is whether it was based upon probable cause.

The seizure of the appellant by requiring him to go into Mason's apartment constituted a seizure of his person. On the facts of this case, considering the existence of probable cause, the very limited intrusion undertaken, and the ready destructibility of the evidence, we cannot say that this search violated the Fourth and Fourteenth Amendments.

Certainly the appellant could have been seized and searched at the automobile in the cold and rain. Searches

[1] See *U. S. v. Pope*, 561 F. 2d 663, 668 (6th Cir. 1977).

and seizures that could be made on the spot at the time of arrest may legally be conducted later when the accused arrives at the place of detention. *Abel v. United States,* 362 U. S. 217, 80 S. Ct. 683, 4 L. Ed. 2d 668 (1960). Similarly here under these circumstances, when the officers' observations corroborated the minute and detailed facts contained in the warrant this would support a probable cause belief that one or more of the occupants had committed a felony. A felony arrest validly may be made on that basis. [*E. g. U. S. ex rel. LaBelle v. LaVallee,* 517 F. 2d 750 (2nd Cir. 1975); *Gullett v. United States,* 387 F. 2d 307 (8th Cir. 1967), cert. den., 390 U. S. 1044, 88 S. Ct. 1645, 20 L. Ed. 2d 307 (1968); *State v. Bell,* 263 S. C. 239, 209 S. E. 2d 890 (1974), cert. den., 420 U. S. 1008, 95 S. Ct. 1453, 43 L. Ed. 2d 767 (1975)].

Clearly, all the surrounding circumstances within the knowledge of the arresting officers, when measured by the standard appropriate for a reasonable, cautious and prudent officer engaged in a narcotics investigation, indicate that there was probable cause for an arrest.

"Rather than blind worship of cause alone, the law probes for the basis of the officer's action measuring it by an external standard." *U. S. v. Walker,* 246 F. 2d 519, 528 (7th Cir. 1957).

In making this assessment we do not isolate for independent analysis each factual circumstance, but view the action of the arresting officers on the basis of the *cumulative effect* of such facts in the totality of the circumstances. *Jackson v. U. S.,* 408 F. 2d 1165 (8th Cir. 1969); *U. S. v. Williams,* 442 F. 2d 738 (1970). Here the arrest took place outside the apartment, after the officers made a brief "pat down" search in the cold and rain. They had a legal search warrant, and sufficient information from a confidential informer, most of which was corroborated. We would hold the search was incident to a lawful custodial arrest made upon probable cause.[2] *U. S. v. Robinson,* 414 U. S. 218, 94

[2] The custodial arrest occurred when the officers required appellant to come into the apartment.

S. Ct. 467, 38 L. Ed. 2d 427 (1973). Writing for the Court, Justice Rehnquist stated:

> "A police officer's determination as to how and where to search the person of a suspect whom he has arrested is necessarily a quick *ad hoc* judgment which the Fourth Amendment does not require to be broken down in each instance into an analysis of each step in the search.——, does not depend on what a court may later decide was the probability in a particular arrest situation . . ." 94 S. Ct. 477.

Appellant argues that probable cause for arrest existed only as to Mason, if at all, and therefore the arrest and subsequent search of appellant was improper under *Sibron v. New York,* 392 U. S. 40, 88 S. Ct. 1889, 20 L. Ed. 2d 917 (1968). Unlike *Sibron,* the facts here were sufficient to lead the officers to conclude that there was criminal activity; and unlike *U. S. v. DiRe,* 332 U. S. 581, 68 S. Ct. 222, 92 L. Ed. 2d 210 (1948), the same facts lead to the conclusion that appellant was equally involved as Mason. It is unreasonable to infer that anyone other than a participant would be present. In such a persuasive setting probable cause existed to search all present. *U. S. v. Johnson,* 475, F. 2d 977, 980 (1973); *State v. DeSimone,* 288 A. 2d 849 (N. J. 1972).

It is important to distinguish the search in this case from the search of companions in a public place. *U. S. v. DiRe, supra.* While one is entitled to know wherever he may be "he will be free from unreasonable searches," *Katz v. U. S.,* 389 U. S. 347, 88 S. Ct. 507, 515, 19 L. Ed. 2d 576 (1967), the test of *reasonableness* will include place and circumstances.

Moreover, the Fourth Amendment does not forbid the search for evidence simply because the owner, possessor, occupant or visitor of the place to be searched is not a suspect when the search warrant was issued. Whether the third party is suspect or not, the State's interest in enforcing the criminal law and recovering evidence remains the same. A search warrant is often acquired, early in an investigation, certainly before all the perpetrators are or

could be known. Forbidding the search of the third person on the premises could easily result in the disappearance of the evidence.

No more should be required where the warrant issued for the seizure of criminal evidence on the premises. Here the appellant was on the premises, the criminal evidence was found in his pocket.[3] The search was substantially contemporaneous with the arrest.

Under the circumstances in this case, an expectation of privacy by the appellant is not "one that society is prepared to recognize as reasonable." *Katz v. U. S.*, 389 U. S. 347, 361 (1967).

Thus even assuming no exigency attended the arrest, the search was proper since it was contemporaneous with the arrest. The officers had probable cause to believe that an offense was being committed and that the appellant was in possession of evidence of the crime at the time of the arrest. The standard of reasonableness does not rise or fall on the detached observations of the courts as to whether an exigency existed at the time of the arrest. It must be based on a subjective analysis of the situation confronting the arresting officers.

Based upon the instant operative factual setting we conclude the arrest and search was attended by exigent circumstances. The lawful arrest established the authority to search. We hold in the case of a lawful custodial arrest a full search of the person is not only an exception to the warrant requirement of the Fourth Amendment, but is also a "reasonable" search.

AFFIRMED.

LEWIS, C. J., and LITTLEJOHN, A. J., concur. RHODES and GREGORY, JJ., dissent.

GREGORY, A. J. (dissenting): I respectfully dissent.

The only question presented by this appeal is whether the second search of the appellant Ferrell was lawful. The validity of the search warrant for Mason's apartment, the validity of the pat-down or first search of the appellant, and the search of Mason's automobile are not at issue.

[3] For analagous case see *Zurcher v. Stanford Daily, et al.*, 98 S. Ct. 1970 (1978).

The majority opinion justifies this second search as a search incident to the lawful warrantless arrest of appellant. This justification for the search, however laudatory it may be in view of the fact that appellant actually was in possession of the phencyclidine,[1] was introduced into this case for the first time by the majority opinion.

The record reveals that no arrest was made by any law enforcement officer at the scene prior to the second search of appellant:

> "MR. HETRICK: Now, at the time that car pulled up, what exactly happened: Did you immediately go to the car and place the individuals under arrest, or were they on their way inside the apartment when you accosted them?
>
> "SGT. PARSONS: We approached the car, we placed no one under arrest at that time. They were being detained.
>
> * * *
>
> "Q.: He was under arrest at that point?
>
> "A.: I wouldn't say he was under arrest, he was being detained. We had no—no officer at the time had said, 'You are under arrest.'"

In fact, the record reveals that no arrest was made until *after* the second search:

> "SOLICITOR WILKINS: All right, after finding these pills on Mr. Ferrell's person, did you take him into arrest custody and transport him to the law Enforcement Center?
>
> "SGT. PARSONS: Yes, sir, I informed him *at that time* that he was under arrest for possession with intent to distribute PCP and that he would be taken to the Greenville County Detention Center." (Emphasis added.)

Thus, the law enforcement officer in charge asserts no arrest of Ferrell was made prior to the second search.

[1] As a result of a recent amendment to Section 44-53-210 (f), 1976 Code, phencyclidine is now a Schedule II controlled substance. See Act No. 118 of 1979.

At trial, no argument was presented by the capable solicitor that the second search was made as an incident to the arrest of Ferrell. The solicitor argued that the second search of appellant was lawful under the "automobile exception" to the warrant requirement. The trial judge agreed and admitted the phencyclidine into evidence on the ground that the second search was lawful under the automobile exception, not the search incident exception.

On appeal, the State actually argues that Ferrell was not arrested until after the second search, and the brief of the State contains the following synopsis of the testimony of the law enforcement officers: "The police consistently testified that he [Ferrell] was not arrested until after the pills were found in his possession."

Since the law enforcement officers had no warrant to search appellant, the burden was upon the State to show that the search was permissible without a warrant. *State v. Ellefson,* 266 S. C. 494, 224 S. E. 2d 666 (1976). At no stage of the proceedings in this case has the State attempted to justify the second search of appellant as an incident of a lawful, warrantless arrest.

Assuming, however, that the State had advanced the "search incident" justification to the trial court, the facts of this case simply will not support the finding of probable cause necessary for the warrantless arrest and search of appellant.

The law enforcement officers at the scene did not observe appellant enter or leave Mason's apartment prior to the time of the second search. The police could neither identify the grey Corvette that drove away from the apartment complex nor the two occupants of the automobile. Although the Corvette drove in the direction of the Donaldson Center, no one followed the car to determine whether it went to the Donaldson Center.

When a grey Corvette later drove into the apartment complex, the police were unable to say whether it was the same grey Corvette that had left the complex earlier, and if it was, whether the two individuals who got out of the automobile were the same two individuals who had left in it.

The police searched the automobile for drugs, and conducted a pat-down search for weapons and drugs of both Mason and appellant. Nothing even remotely suspicious was uncovered by any of these searches. Every circumstance negated probable cause for a warrantless arrest and search of appellant, who was not known to the police officers as a criminal or one connected with drug trafficking. It is also worthy of note that the search of Mason's apartment, which occurred after the second search of Ferrell, revealed no drugs.

Moreover, even if the officers' suspicion that appellant was connected with the drug trafficking were reasonable, nothing short of particularized probable cause would have permitted the search of appellant for drugs. His mere presence on premises subject to a valid search warrant, without more, is not enough. *Ybarra v. Illinois,* 48 U. S. L. W. 4023, (November 28, 1979). This is especially true since the police ordered appellant into the premises after having conducted a fruitless *Terry* pat-down outside the premises.

> [A] person's mere propinquity to others independently suspected of criminal activity does not, without more, give rise to probable cause to search that person. *Sibron v. New York,* 392 U. S. 40, 62-63. Where the standard is probable cause, a search or seizure of a person must be supported by probable cause particularized with respect to that person. This requirement cannot be undercut or avoided by simply pointing to the fact that coincidentally there exists probable cause to search or seize another or to search the premises where the person may happen to be.

Ybarra, supra, 48 U. S. L. W. at 4025.

In my view, none of the informant's tips were remotely corroborated by the police prior to the time of the second search. Because of this total lack of corroboration, the informant's tips never ripened into probable cause and the phencyclidine was seized as a result of a warrantless search made without probable cause for a warrantless arrest.

I would reverse appellant's conviction and sentence.

RHODES, A. J., concurs.

APPENDIX B

Excerpts from the Trial Testimony

(1) Cross examination of Sergeant Walt M. Parsons at the pre-trial suppression hearing. (TR. 22-23)

Q. All right, now, in the search warrant for Mr. Mason's apartment, was there a provision in there to search all the occupants of his apartment?

A. Yes, sir—well, there was no provision, but it is standard procedure.

Q. Well, I mean, did you search every occupant inside that apartment when you went inside to execute that search warrant?

A. No, sir, we didn't search completely. There were two females in the apartment at the time along with Mr. Mason and Mr. Ferrell. We did not completely—

Q. You did not search the females present?

A. No, sir, the only thing we did was we asked them to empty anything they had in their pockets.

Q. Did they do that?

A. Yes, sir.

Q. So, that you felt, based on your search warrant, you had probable cause to search anybody inside that apartment?

A. Yes, sir.

(2) Cross examination of Sergeant Walt M. Parsons at trial. (TR. 51); Cumulative testimony. (TR. 24-26)

Q. At the time you procured that warrant, did you have any information whatsoever about the defendant in this case, Glen Ferrell?

A. Mr. Ferrell, no, sir, not directly.

Q. No information, whatsoever?

A. No.

(TR. 55-56); Cumulative testimony. (TR. 24-26, 28)

A. I had received information that afternoon that Mr. Mason would more than likely be driving a gray Corvette but I could not substantiate it. My probable cause was that he would be driving it to go to Donaldson Center to the stash house and make the pick-up.

Q. But, at the time you approached the vehicle with your pistols drawn, all of your information concerned Mr. Phil Mason, is that correct?

A. Yes, sir.

Q. Do you know when Glen Ferrell joined his company that night?

A. No, sir, I don't.

Q. Do you know if Mr. Mason even knew Mr. Ferrell?

A. Yes, sir, he knew him.

Q. How do you know that, at that time?

A. At that precise time, the moment we approached the car, no, sir, but I learned later that they were good friends.

Q. At that time you did not even know they were friends?

A. At that precise moment—

Q. He could have been a hitchhiker?

A. Right, he could have been a hitchhiker, yes, sir.

Q. So, you had no search warrant for Mr. Ferrell's apartment or his person or his car, did you?

A. No, sir.

(3) Direct examination of Sergeant Walt M. Parsons at trial. (TR. 44); Cumulative testimony. (TR. 20)

Q, All right. Did you conduct a search of the Corvette there in the parking lot?

A. Yes, sir, we did. We made a thorough search of the Corvette there in the parking lot.

Q. All right, did you find any type of contraband or narcotics, anything else illegal there inside the Corvette itself?

A. No, sir.

(4) Direct examination of Deputy William R. Bennett at trial. (TR. 63); Cumulative testimony. (TR. 68)

Q. All right, did you conduct a pat-down search of defendant, Mr. Ferrell, out in the parking lot?

A. Yes, I did.

Q. And what were you searching for at that time?
A. Weapons.
Q. Pistols, weapons, knives?
A. Right.
Q. Did you find any dangerous weapons on him at that time?
A. No, sir.

APPENDIX C

Constitution of South Carolina

(1) Article I, Section 10—Searches and Seizures; Invasions of Privacy

The rights of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures and unreasonable invasions of privacy shall not be violated, and no Warrants shall issue but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, the persons or things to be seized, and the information to be obtained.

(2) Article I, Section 3—Privileges and Immunities; Due Process; Equal Protection of Laws

The privileges and immunities of citizens of this State and of the United States under this Constitution shall not be abridged, nor shall any person be deprived of life, liberty or property without due process of law, nor shall any person be denied the equal protection of the laws.

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(3) Section 44-53-230—Schedule III

(a) The controlled substances listed in this section are included in Schedule III.

(c) Unless specifically excepted or unless listed in another schedule, any material, compound, mixture or preparation which contains any quantity of the following substances having a depressant effect on the central nervous system:

9. Phencyclidine

(4) Section 44-53-370—Prohibited Acts A; Penalties

(a) Except as authorized by this article it shall be unlawful for any person:

(1) To manufacture, distribute, dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance;

(2) To create, distribute, dispense, or possess with intent to distribute or dispense, a counterfeit substance.

(b) Any person who violates subsection (a) with respect to:

(2) Any other controlled substance classified in Schedule I, II, or III shall be deemed guilty of a misdemeanor and, upon conviction, shall for a first offense be sentenced to a term of imprisonment for not more than five years or a fine of not more than five thousand dollars, or both. For a second offense, or if, in the case of a first conviction or violation of any provision of this subsection, the offender shall previously have been convicted of any violation of the laws of the United States or of any state, territory, or district relating to narcotic drugs, marihuana, depressant, stimulant or hallucinogenic drugs, the offender shall be deemed guilty of a felony and, upon conviction, shall be sentenced to a term of imprisonment for not more than ten years, or fined not more than ten thousand dollars, or both. For a third or subsequent offense, or if the offender shall previously have been convicted two or more times in the aggregate of any violations of the laws of the United States or any state, territory, or district relating to narcotic drugs, marihuana, depressant, stimulant or hallucinogenic drugs, the offender shall be deemed guilty of a felony and, upon conviction, shall be sentenced to a term of imprisonment for not less than five years nor more than twenty years, or fined not more than twenty thousand dollars, or both. Except in the case of conviction for a first offense the sentence shall not be suspended and probation shall not be granted.